



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

December 21, 1990

Dr. Kenneth Beasley
Chief Administrative Officer
City of El Paso
Two Civic Center Plaza
El Paso, Texas 79901-1196

Open Records Decision No. 582

Re: Whether documents relating to a police department's investigation of a rapid transit department are exempted from disclosure under article 6252-17a, V.T.C.S., the Open Records Act (RQ-1932)

Dear Dr. Beasley:

You have received a request for access to records pertaining to an investigation conducted by the El Paso Police Department of the city's mass transit department. You ask whether the requested information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S.

We have considered the exceptions you claimed, specifically sections 3(a)(1), 3(a)(3), 3(a)(8), and 3(a)(11), and have reviewed the documents at issue. The documents submitted for our inspection total 51 pages and include information from what appear to be two investigations. One investigation [hereinafter, the "first investigation"] concerns a certain city employee. With respect to this first investigation the information submitted for our inspection includes a report and summary of the investigation, pp. 1 through 26, statements by a number of city employees concerning the investigation, pp. 30 through 43, and recommendations made as a result of this investigation, p. 44. A second investigation [hereinafter, the "second investigation"] concerns certain allegations apparently made to the press by an El Paso city council member. With respect to this second investigation, the information submitted for our inspection includes a summary of the investigation, pp. 27 through 29, statements from city employees, pp. 47 through 51, and a summary of these statements including a recommendation from the investigator, pp. 45 and 46.

You assert that the requested information is excepted from public disclosure by common-law privacy as incorporated

into the Open Records Act by section 3(a)(1). Specifically, you assert that the release of the information will invade the privacy of transit department employees who were subjects of the investigation by placing them in a false light.

False-light invasion of privacy was discussed at length in Open Records Decision No. 579 (1990), q.v. As noted in that open records decision, the gravamen of a false-light privacy complaint is not that the information revealed is confidential, but that it is false. Therefore, an exception to the Open Records Act focused on the confidentiality of information does not embrace this particular tort doctrine. If, as in the case before us, the information is uncertain or contradictory, the Open Records Act allows the public to review the evidence and come to its own conclusions, rather than allowing the governmental body to determine the weight of the evidence itself.

You further assert that the requested information is excepted from public disclosure by the so-called informer's privilege as incorporated into the Open Records Act by section 3(a)(1). This privilege protects the flow of information to the government by excepting the name of the informer from required public disclosure. Open Records Decision No. 549 (1990). If the contents of the informer's statement would tend to reveal the identity of the informer, the privilege protects the statement itself to the extent necessary to preserve the informer's anonymity. Id.

We must first note that none of the statements taken from employees, pp. 30 through 43 and pp. 45 through 51, allege any wrongdoing or violation of the law. These statements are therefore not the kind of statements excepted by the informer's privilege. Open Records Decision No. 515 (1988). However, the report of the first investigation includes summaries of interviews the investigator had with various transit employees. Among these summaries is one in which a subordinate employee is identified by a supervisory employee as the source of certain allegations of possible criminal wrongdoing. Though these allegations were not substantiated, the identity of the employee who thus came forward may be withheld from required public disclosure under the informer's privilege. Certain other information which would tend to identify this employee may also be withheld. This information is marked on p.7 of the materials submitted for our inspection.

Section 3(a)(8) of the Open Records Act excepts information held by a law enforcement agency from required

public disclosure if release of the information "will unduly interfere with law enforcement and crime prevention." Ex parte Pruitt, 551 S.W.2d 706, 710 (Tex. 1977), Open Records Decision No. 531 (1989). Section 3(a)(3) of the Open Records Act excepts from required public disclosure

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

You advise that the police department has concluded its investigation, and has not tendered the file to the district attorney or county attorney for prosecution. You further advise that the city council is conducting its own administrative investigation into this matter. You assert that, as a result of this further investigation, "some of the irregularities which may turn up may affect the Police Department's recommendation and may, in fact, result in eventual prosecution, or further investigation, although that is not foreseen at the moment." This scenario is altogether too speculative and nebulous to form the basis for exception from public disclosure under section 3(a)(8) as information the release of which will unduly interfere with law enforcement. Nor does it appear that criminal litigation is reasonably anticipated.

You advise that the city attorney's office has been contacted by the attorney for the employee who is the subject of the first investigation, and that that attorney threatened a lawsuit against the city if any administrative action is taken against his client. However, you do not advise, nor is it apparent, that any administrative action against the employee is contemplated. As a result, we have no basis upon which to conclude that any anticipation of civil litigation is reasonable. Accordingly, the information is not excepted from public disclosure under section 3(a)(3).

Finally, you assert that the requested information is excepted under the exception for intra-agency memoranda found in section 3(a)(11). Information is excepted from required public disclosure under section 3(a)(11) to the

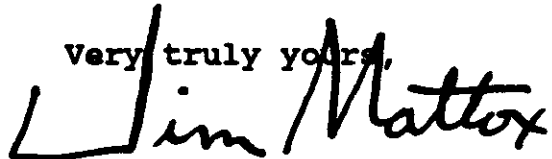
extent it consists of advice, opinion, or recommendation used in the deliberative process. Factual matter, where severable, is not excepted by section 3(a)(11). See Open Records Decision No. 559 (1990). The information submitted for our inspection primarily consists of a factual recitation of the investigations undertaken; as such, it is not the kind of information excepted by section 3(a)(11). Id. Nor do the statements taken from employees consist of advice, opinion, or recommendation. However, on pp. 44, 45, and 46 of the materials submitted for our inspection, the investigator makes specific recommendations based on the results of his investigations. We have marked these recommendations and they may be withheld.

The balance of the requested information must be released.

S U M M A R Y

Portions of a police department investigation of a mass transit department which are within the informer's privilege, or which are recommendations to be used in the deliberative process are excepted from required public disclosure.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is stylized with a large, sweeping "J" and a cursive "Mattox".

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